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The Modern American Cases Arising Out of Trade and Labor Disputes

BY
WILLIAM DRAPER LEWIS, PH. D.

PUBLISHED BY THE DEPARTMENT OF LAW OF
UNIVERSITY OF PENNSYLVANIA
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THE MODERN AMERICAN CASES ARISING OUT OF TRADE AND LABOR DISPUTES.[1]

A trader or laborer may harm other traders or laborers in several ways. If the harm is due to direct violence[2] or false statement, the law has no hesitation in holding the person responsible liable in damages to the injured person. But a man may do harm to another's trade or business, not only by violence or misrepresentation, but by merely abstaining from dealing with him or by inducing his customers or employees to leave him or his employer to discharge him. The strike, the lockout, and the boycott are the most prominent examples of acts of this class producing harm.

The strike is an agreement between two or more persons not to deal in a business way with a third. A labor strike

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[1] The English cases are treated by the writer in an article entitled "Some Leading English Cases on Trade and Labor Disputes," 51 Am. Law Reg. 125, March, 1903.

[2] Under the head of direct violence may be included those cases in which a plaintiff has been interrupted in the exercise of his profession or business by noisy demonstrations intended to interrupt, but not necessarily threatening him with personal violence—as hissing an actor at a theatre, as in *Gregory* v. *Duke of Brunswick*, 13 L. J. C. P. 34, 1843, or frightening wild fowl who were approaching the plaintiff's decoy, as in *Keeble* v. *Hickeringill*, 11 East. 574, note, and *Carrington* v. *Taylor*, 11 East. 571, 1809.

occurs where the employees of a person or corporation leave their employment in a body and refuse to return until their wishes are complied with. But there is also the employer's strike and a trade strike. The employer's strike is usually termed a lockout or agreement to black list. Several employers agree to discharge their hands until they are willing to work on certain terms, or agree not to employ a person who as the employee of any one of them has broken a rule of conduct which the employers desire their employees to observe. The trade strike is where several traders agree together to refuse to deal with another trader.

The boycott is economic pressure brought to bear on those who deal, or are about to deal, in a business way with a third person to prevent them from dealing with such third person. There are always three persons or classes of persons in a boycott—the person or persons who persuade, those whom they persuade, and the person boycotted. The method of persuasion used is always the threat of business harm, usually couched in the formula: If you deal with A, we won't deal with you. One man may be "persuaded" not to deal with another, not only by economic pressure, but by violence or the threat of violence to person or property. Or, the method of "persuasion" may be by mere argument, or by the offer of money or money's worth. None of these are true boycotts. As classes of acts which interfere in the business relations of others they have not received a distinctive name.

The purpose of this article is to show the development in this country of the law of tort as applied to the strike, the boycott, and the persuasion of third persons by argument or by violence or by the offer of money not to deal with another. The method which we shall pursue will be to treat the various legal questions in the order in which our courts have been called upon to deal with them.[3]

[3] As the writer believes that the old common-law action for enticing servants has had no influence on the development of the modern law as affecting the subject of this article, he has omitted all discussion of the few modern cases discussing this action. Some modern cases of this class occasionally cited in the trade and labor cases are *Haskins* v. *Royster*, 70 N. C. 601, 1874; *Bixby* v. *Dunlap*, 56 N. H. 456, 1876.

In 1854 the case of *Hunt* v. *Simonds*[4] came before the Supreme Court of Missouri. It raised the question of the legality, from the point of view of private law, of what we have called the trade strike, or an agreement between two or more traders, who have been dealing with a third, to discontinue dealing with him. The plaintiff had been the owner and captain of a steamboat. He alleged that the defendants, who were the officers of various insurance companies, combined, confederated, and conspired wilfully and maliciously to injure him, and, with the intent of effecting their object, refused, without cause, to take any insurance upon his boat, whereby he was deprived of all benefit from his occupation, and was compelled to sell his boat and abandon his business. The defendants demurred, the court sustained the demurrer, and the Supreme Court confirmed this action. The case stands for the proposition that two or more traders, not being under any contract to continue to deal with a third trader, may combine to refuse to deal with him, for a good reason, a bad reason, or no reason at all, without being liable for any harm which may result to such third trader. The court rests its decision on two propositions: First, that a man has an absolute right to deal or not to deal with another as he pleases.[5] Second, that what one man has an absolute right to do two or more men have a right to "combine" or agree together to do;[6] in other words, that in our civil, as distinguished from our criminal law, there is no such thing as liability for conspiracy to harm unless the harm, considered apart from the conspiracy, is a legal injury. This last proposition has been followed in a number of cases of the class which we are considering.[7]

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[4] 19 Mo. 583, 1854.

[5] "It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which the party sustains, there rests upon him the legal obligation to deal and contract with others."

[6] Pages 587, 588.

[7] *Randall* v. *Hazelton*, 94 Mass. 412, 1866; *Bowen* v. *Matheson*, 96 Mass. 499, 1867, 502; *Van Horn* v. *Van Horn*, 52 N. J. L. 284, 1890, 286; *Moores* v. *Bricklayers' Union*, 23 Ohio Law Bul. 48, 1890, 53; *Delz* v. *Winfree*, 80 Tex. 400, 1891, 404; *Bohn Mnf. Co.* v. *Hollis*, 54 Minn. 223,

The first proposition assumes that some rights are absolute; that is, may be exercised under all circumstances and from any motive without the actor being liable for the resulting harm. From this assumption it does not necessarily follow that there may not be some rights which are not absolute. There may still be acts for the harmful results of which the actor may or may not be liable according to the circumstances under which, or the motive with which, they were performed. The court in this case, however, by assuming that if the plaintiff was to recover, the defendant's act must be shown to be wrongful, apparently assumes that all rights recognized by law are absolute rights.[8] In short, the court assumes that acts are either rightful or wrongful and only those falling under the latter class can be a ground of civil action.[9] The case of *Hunt* v. *Simonds* has been followed in *Bowen* v. *Matheson*[10] and *Bohn Manufacturing Company* v. *Hollis*.[11] In the latter case the defendants were

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1893, 234; *Graham* v. *St. Charles St. Ry. Co.*, 47 La. Ann. 214, 1895, 216; *Boyer* v. *Western Union Tel. Co.*, 124 Fed. 246, 1903, 248. See apparently contra *Blindell* v. *Hagan*, 54 Fed. 40, 1893, affirmed, *sub non Hagan* v. *Blindell*, 56 Fed. 696, C. C. A. 1893; *Elder* v. *Whitesides*, 72 Fed. 724, 1895. The cases contra arose in the Circuit Court for the Eastern District of Louisiana. Compare *Boutwell* v. *Marr*, 71 Vt. 1, 1899, s. c.; 42 Atl. 607, 609. In *Mapstrick* v. *Ramge*, 9 Neb. 390, 1879, a case very badly reported, the court appear to interpret the principle that damage, not conspiracy, is the gist of the action where a number of persons have conspired to injure another, as meaning that if A et al. conspire to harm B and harm results, that B has an action against A et al. irrespective of the purpose of A et al. or the method by which the harm was inflicted. This amounts to an assertion that all conspiracies to harm resulting in harm are actionable.

[8] Note argument 19 Mo. page 586, and the statement, page 589, to the effect that "The important allegation, in determining whether this action will lie, is that which states the acts of the defendants, which were intended to effect their object."

[9] This view of legal rights and legal wrongs, which leads to the assumption that no man is liable for his acts until they are shown to be in themselves wrongful, has been taken in the trade and labor cases: By Chapman, J., in *Bowen* v. *Matheson*, 96 Mass. 499, 1867, 502, *et seq.*; by Sage, J., in *Casey* v. *Cincinnati Typo. Union*, 45 Fed. 135, 1891, 143. See also *Matthews* v. *Shankland*, 56 N. Y. Supl. 123, 1898, 128. In accord with the proposition that one man, irrespective of his purpose, has an absolute right to refuse to deal with another, see the language used in the following cases: *Delz* v. *Winfree*, 80 Tex. 400, 1891, 404; *Graham* v. *St. Charles St. Ry. Co.*, 47 La. Ann. 214, 1895. See also cases cited *infra*, note. But see *Mattison* v. *Lake Shore and M. S. Ry. Co.*, 3 Ohio Dec., Sup. and C. P. 526, 1895.

[10] 96 Mass. 499, 1867, discussed *infra* on another point.

[11] 54 Minn. 223, 1893.

members of an association known as the Northwestern Lumbermen's Association, the membership of which embraced about one-half the retail lumber dealers in Iowa, Minnesota, Nebraska, and the Dakotas. They resolved that if any wholesale dealer sold directly to a consumer in a territory in which a member of the association did business and refused on demand to pay to the association a commission of ten per cent. on such sale, the secretary should notify each member not to deal with said wholesaler, and thereafter any member who did deal with him would be expelled from the association. The Bohn Manufacturing Company, a wholesale lumber company, sold directly to a consumer against the above-mentioned rule and refused to pay the commission demanded. They then asked the court to restrain the officers of the association from sending out notices to the members notifying them not to deal with the plaintiff or any other matter that might tend to injure the plaintiff's trade or business. The court on appeal dissolved the temporary injunction granted, not on the ground that a court of equity being unable to act effectively would not act at all, but on the broad ground that the defendants in doing what they did, though injuring the plaintiff, were acting within their legal rights. The opinion of Justice Mitchell in this case goes as far as the decision in *Hunt* v. *Simonds* in holding that a trade strike is legal for any purpose. The facts of the two cases, however, may be distinguished. In the Minnesota case, at least, the ultimate purpose of the defendants in doing what they did was to advance their own interests by keeping the wholesaler out of the retail market, while the demurrer in *Hunt* v. *Simonds* admits that the purpose of the defendants in that case was merely to enjoy the ruin of the plaintiff's business.[12]

[12] *Russell* v. *New York Produce Exchange*, 58 N. Y. Supl. 842, 1899, is an example of a case belonging to the same class as *Bohn Mnf. Co.* v. *Hollis*, in which the facts were more strongly in favor of the defendants. The members of a stock exchange resolved that they would not allow their members to buy or sell on the exchange for any person who was guilty of practices which the members of the association regarded as inimical to their interests. The officers of the association, acting under the rules of the association, posted the plaintiffs on the floor of the exchange as having been guilty of the prohibited practices. The court

In the cases just discussed the defendants refused to deal with the plaintiff. In the next case, *Orr* v. *Home Mutual Insurance Company*,[13] the defendants refused to have any business relations with anyone who did business with the plaintiff. The plaintiff alleged in his petition that he was a master of a steamboat on the Red River, and that the defendants, certain insurance companies, had maliciously combined to refuse to insure anything or any steamer on which the plaintiff was employed, and that by reason of this action on the part of the defendants the owner of the vessel discharged him. The defendants' contention that the plaintiff's petition showed no cause of action was sustained by the court on the ground that the defendants had the absolute right under all circumstances and from whatever motive to refuse to insure a boat or its cargo. *Bowen* v. *Matheson*,[14] the Massachusetts decision before mentioned, is in accord with this case. The plaintiff kept a seamen's boarding-house. The defendants were also keepers of seamen's boarding-houses and members of the "Seamen's Mutual Benefit Association." The rules of the association provided that the members should use their best endeavors to prevent any seaman boarding with them from shipping in any vessel where any of the crew were shipped from a house not in good standing with the association, and that any members of the association knowingly shipping any of their boarders on vessels having men shipped from houses not in good standing should be fined five dollars for each man shipped. The plaintiff alleged that the defendants, unlawfully and maliciously conspiring to injure him in his business, "took their men out of ships because the plaintiff's

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refused to restrain by injunction this action of the officers of the association on the ground that it was not for an outsider to complain of the rules of the association. It would appear that the case decides that two or more persons acting as brokers could agree together that they would not represent in transactions with each other certain persons when the rules by which the obnoxious persons were determined were primarily designed, not for the injury of the persons excluded, but for the benefit of the brokers. See, also, *Collins* v. *American News Co.*, 34 Misc. 260, N. Y. Sup. 1901.

[13] 12 La Ann. 255, 1857.

[14] 96 Mass. 499, 1867.

men were in the same," and thus prevented him from getting seamen as boarders.[15] The defendants demurred, and the court sustained the demurrer. The demurrer in effect admitted that the defendants for their own private good and ends had said to the owners of vessels: "You have your choice. Take men from our houses or from the plaintiff's house, but you cannot deal with us and with the plaintiff." It would also appear that the demurrer admitted that the customers of the plaintiff ceased dealing with him because of these threats. Here, as in the earlier Louisiana case, we have all the elements of a boycott. There was, however, no attempt on the part of the defendants to interfere with any existing contract between the plaintiff and his customers. The business or economic pressure was brought against those who otherwise would have dealt with the plaintiff. On the other hand, the demurrer would seem to be an admission that the purpose of the defendants was not necessarily their own advancement, but might have been a mere desire to harm the plaintiff. The court, however, apparently treats the case as involving a discussion of the limits of fair trade competition, thereby assuming that the defendants were acting for their own interests, and not for the purely malicious purpose of injuring the plaintiff. The case stands for the proposition that the person boycotted has no civil action for the harm done him, at least in the case where both plaintiff and defendants are traders, and the defendants' motive was self-advancement. Irrespective of the decision, the opinion itself, which is written by Justice Chapman, is an extreme example of that method of examining a doubtful question of tort which consists in separating each act of the defendant from the surrounding circumstances and the purpose of the actors and asking, in relation to an act so separated, "Had the defendant a right to do this act?"[16] Furthermore, there is the practical assumption that, as I have a right to refuse to have business dealings with another, unless I am bound to him by contract, I can place

[15] Page 502.
[16] See *supra*, note 8.

any condition on my dealing with him that I please, provided I do not ask him to commit a tort or breach of contract, without any possibility of becoming liable to him or anyone else.[17] The decision in *Bowen* v. *Matheson* has been followed in at least two American and one Scottish case.[18] In the American cases, *Macauley* v. *Tierney* and *Transportation Company* v. *Standard Oil Company*, and in Lord Lindley's approval of the Scottish case, in the celebrated case of *Quinn* v. *Leathem*, the theory given is different from that in *Bowen* v. *Matheson*. The inference, that as I have a right to refuse to have business dealings with another, I can therefore place any conditions on dealing with him which I see fit, no matter how injurious those conditions may be to a third person, without being liable to such third person, is denied. It is admitted that a trade boycott for a malicious purpose may be actionable, but the fact that in the cases cited the boycott was instituted by the defendants for their own business advancement is regarded as a legal justification for their act.[19] On the other hand, in two other American cases the plaintiff has been allowed to

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[17] It is interesting to compare with this modern case the old case of the Abbot of Lilleshall in Pub. of Sel. Soc. Select Pleas of the Crown, vol. 1, page 115, a case in the year 1221, where the Abbot brought an action against the bailiffs of Shrewsbury because they made a proclamation that anyone who sold to the Abbot should forfeit ten shillings. The plaintiff was put to his law.

[18] *Macauley* v. *Tierney*, 19 R. I. 255, 1895; *Transportation Co.* v. *Standard Oil Co.*, 50 W. Va. 611, 1902; *Scottish Co-operative Society* v. *Glasgow Fleshers' Asso.*, 35 Scott, L. R. 645, 1898. The last case was approved by Lord Lindley in *Quinn* v. *Leathem* (1901), A. C. 495, 539. The facts of *Mogul S. S. Co.* v. *McGregor*, L. R. 23 Q. B. 598, 1899, s. c. (1892), A. C. 25, may be said to involve a trade boycott. The plaintiff failed to recover. See, however, 51 Am. Law Reg., page 131.

[19] The theory of these cases will be discussed in connection with the decision of *Walker* v. *Cronin*, *infra*.

In accordance with the position that a trade boycott for a malicious purpose, as for satisfying a grudge against the plaintiff, gives him a good cause of action, see *International and Great Northern Ry. Co.* v. *Greenwood*, 2 Tex. Civ. App. 76, 1893; *Graham* v. *St. Charles St. Ry. Co.*, 47 La. Ann. 214, 1895; *Transportation Co.* v. *Oil Co.*, 50 W. Va. 611, 1902; *Webb* v. *Drake*, 52 La. Ann. 290, 1899. Contra, *Payne* v. *The Western & Atl. Ry. Co.*, 13 Lea. 507 Tenn., 1884. In *Cote* v. *Murphy*, 159 Pa. 420, 1894, the purpose of the defendants seems to have been to punish the plaintiff, who was an employer of labor, for not standing by the defendants during a general strike in the trade, but the plaintiff failed, in the opinion of the court, to show damage.

secure an injunction to restrain a trade boycott, though the purpose of the defendants was to advance their own business interest. In the first of these cases, *Jackson* v. *Stanfield*,[20] the facts are identical with *Bohn Manufacturing Company* v. *Hollis*,[21] except that the action was brought by a consumer, or rather retailer, of lumber, who was not a member of the Lumbermen's Association, against the association for threatening the manufacturers with a withdrawal of their custom if they sold to the plaintiff. The court held that the plaintiff could not only recover for his loss of business, but was entitled to an injunction against the continuation of the boycott. The case of *Walsh* v. *Association of Master Plumbers*[22] is identical with *Macauley* v. *Tierney* just referred to. Both cases arose out of the attempt of the Association of Master Plumbers to drive out of business all master plumbers who did not join their association by refusing to buy supplies from any manufacturer who sold to a master plumber not a member of the association. In both cases the plaintiff was a master plumber not a member of the association, who because of the boycott was unable to obtain plumbing supplies from the manufacturers. As stated, the Rhode Island Court came to the conclusion that the action of the association was not a civil wrong to the plaintiff. The Court of Appeals of Missouri reached an opposite conclusion. The result is that at the present time there is a conflict of authority in regard to a boycott of one trader by several other traders, some cases holding the boycotters liable for the harm resulting from the boycott, though their purpose was self-advancement, others holding that the person harmed cannot recover.

Since the decision in *Bowen* v. *Matheson*, the drift of authority has been against the extreme position which is apparently taken by Justice Chapman in that case—namely, that one man may, with a purely malicious desire to harm another, say to a third, "If you deal with that other I will not deal with you," without being liable to the other for the

[20] 137 Ind. 592, 1893.
[21] 54 Minn. 223, 1893.
[22] 97 Mo. App. 280, 1902, s. c., 71 S. W. 455.

resulting harm. Indeed, Justice Chapman himself in the next trade and labor case coming before his court abandons the assumption of the absolute right to do an act irrespective of its consequence, or the purpose of the actor, on which assumption his opinion in *Bowen* v. *Matheson* appears to have been based.

The case referred to is *Carew* v. *Rutherford*.[23] The plaintiff was a master stone-cutter. His laborers were members of a union. A rule of this union provided that the master stone-cutters should not send their work out of the state. The plaintiff violated this rule. The president of the union, who was his foreman, came to him and said that the union had voted, in view of this violation of its rules, that he should pay a fine of five hundred dollars to the union. He refused to do this and his men went out on strike. Subsequently the president and other members of the union told him that no member of their union would be allowed to work in his shop if he refused to pay the money demanded. As he had important contracts on hand and unfinished, he paid the money demanded to one Wagner, the treasurer of the union. The plaintiff sued the defendants, including the president, treasurer, and members of the union, as an unincorporated association, in contract with an alternative count in tort. The trial judge thought that the facts given did not constitute a cause of action. On appeal, the count in tort was sustained. It will be noted that the act of which the plaintiff complained was the demand by the defendants that he should pay money as a prerequisite to their returning to work. The plaintiff was under no obligations to pay the money. The defendants did not threaten him with physical harm either to his person or his property. The defendants, however, did take advantage of the circumstance that the plaintiff was in need of men to complete his contracts with third persons, and of the fact that their organization included most of the skilled workmen in the trade, to bring economic pressure, or a threat of practical business loss, unless the money was paid. Their purpose, as far as the purpose is made clear by the

[23] 106 Mass. 1, 1870.

facts as found by the trial judge, was partly to increase the money in the treasury of the association, and partly to punish the plaintiff for violating a rule of their association, and through such punishment to deter him and others from again violating the rule, the rule itself having been adopted because the members of the union thought it would advance their interests as laborers. From the point of view of Chief-Justice Chapman, who wrote the opinion, the essential fact making the defendants' act illegal was the fact that they had taken advantage of the circumstances to force the plaintiff to pay them money to avoid a still greater business loss.[24] Under this view it may be stated that the court thought that it is illegal to obtain money from another, which that other does not owe, by a threat of business harm, and the mere fact that the threat takes the form of a refusal to work until the money is paid, the threatener not being under contract to work, is immaterial. The cases in the note are sufficient to show that until again discussed and affirmed the case and the proposition on which it rests are doubtful.[25]

It is curious to note that the opinion of Justice Chapman in *Carew* v. *Rutherford* illustrates a radically different way of approaching a doubtful question of alleged tort than that shown by his opinion in *Bowen* v. *Matheson*. Instead of the

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[24] Page 11.

[25] The facts in *Bohn Manufacturing Co.* v. *Hollis*, 54 Minn. 223, 1893, which are detailed in the text, *supra*, show that the court did not think it illegal for a number of retail lumber merchants to refuse to buy lumber from a wholesale merchant until the wholesale merchant paid the association a sum of money he did not owe them. On the other hand, in *Schulten* v. *Bavarian Brewing Co.*, 96 Ky. 224, 1894, it was held that a declaration which stated that the defendants refused to sell to the plaintiff beer until he had paid one of their number a sum of money, though the declaration alleged harm to the plaintiff's business, was only insufficient because the plaintiff did not allege that he did not owe the money. Had he so alleged the decision would have been in accord with *Carew* v. *Rutherford*. The principle that if the money is due to one member of an association of business persons the members of the association may lawfully agree not to sell to the debtor until he pays the debt was applied in *Brewster* v. *Miller's Sons*, 19 Ky. Law. Rep. 593, 1897. The case of *Ryan* v. *Burger & Hower Brewing Co.*, 13 N. Y. Supl. 660, 1891, in which the facts on which the action is based are nearly identical with *Schulten* v. *Bavarian Brewing Co.*, *supra*, seems to have been decided on a question of misrepresentation. *Quare:* Whether several persons could refuse to furnish A with goods until he paid B a debt due B, B having nothing to do with the agreement?

separation of the act causing the harm from the surrounding circumstances of the case with a view of determining its inherent legal character, we have an apparently legal act—the refusal to work until a sum of money is paid—becoming illegal because of the surrounding circumstances. It is perhaps needless to point out that the different results reached in the two cases were probably due to this difference in the method pursued.[26] Again he assumes exactly what in the former case he would seem to deny—namely, that a defendant is at least to be considered *prima facie* liable for any harm to the plaintiff which he has knowingly caused. After citing the early examples given in Bacon's Abridgment of tortious interference in business, as where one disturbs my workmen with threats of personal injury, or menaces my tenants "per quod they depart from their terms," he says: "The illustrations given in former times relate to such methods of doing injury to others as were then practised and to the kinds of remedy then existing. But as new methods of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges." [27]

The case of *Walker* v. *Cronin* [28] further illustrates and explains the theory that a man who knowingly inflicts harm on another must at least show some reason why he should not be held liable for that harm. There were three counts in the plaintiff's declaration. Two were for wilfully persuading those under contract to work for the plaintiff to break their contracts. The court sustains these counts, not because of any peculiarity in the relation of master and servant, but because a legal right derived from the contract was alleged to be violated as a result of the defendant's act.[29] The plaintiff's counts did not state the method of persuasion used, whether it was by argument, economic pressure,

[26] In note 49, *infra*, where the method of approaching a question of tort followed by Justice Chapman in *Carew* v. *Rutherford* produced, in a case like *Bowen* v. *Matheson*, a result favorable to the plaintiff.
[27] Page 11.
[28] 107 Mass. 555, 1871.
[29] Page 567.

or threat of violence. The decision therefore stands for the proposition that to wilfully cause another to break an obligation to a third person gives the third a right of action, not only against the person who broke the contract, but also against the person who caused him to do so. This proposition, which had in effect been already announced in England in the celebrated case of *Lumley* v. *Gye*,[30] has been applied in the American trade and labor cases since *Walker* v. *Cronin*.[31]

In one case, *Jersey City Printing Company* v. *Cassidy*,[32] a court of equity has restrained defendants from in any manner persuading a third person to break his contract with the plaintiff.[33] This, at least on its face, restrains persuasion by argument. *Walker* v. *Cronin* held that such persuasion is *prima facie* a civil wrong, but the wisdom of extending the power of a court of equity to restrain argument may be seriously doubted. If the method of persuasion used to induce the third person to break the contract is the offer of money or other economic advantage, economic pressure, or violence, the court of equity has without hesitation issued its restraining order.[34]

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[30] 2 E. and B. 216, 1853. Followed in *Bowen* v. *Hall*, L. R., 6 Q. B. D. 333, 1881, and *Tempeton* v. *Russell* (1893), 1 Q. B. 715.

[31] Accord: *Doremus* v. *Hennessy*, 176 Ill. 608, 1898. *A futiori* a conspiracy to write the officers of a company with whom the plaintiff has a contract to induce such officers so to act as to effect a practical breach of the contract of the company with the plaintiff is actionable if damage to the plaintiff result. *Angle* v. *Chicago and St. Paul Ry. Co.*, 151 U. S. 1, 1893. Compare *Gatzow* v. *Buening*, 106 Wis. 1, 1900.

[32] 63 N. J. Eq. 759, 1902.

[33] See also the wording of the injunction issued by Justice Holmes in *Vegelahn* v. *Guntner*, 167 Mass. 92, 1896, 96.

[34] The offer of money or other economic advantage to induce third persons to break a contract with the plaintiff was restrained in the following cases: *Lumley* v. *Wagner*, 1 DeG. M. and G. 604, 1852; *American Base Ball Asso.* v. *Pickett*, 8 Pa. C. C. 232, 1890; *Standard Fashion Co.* v. *Siegel-Cooper Co.*, 157 N. Y. 60, 1898; *American Law Book Co.* v. *Ed. Thompson Co.*, 84 N. Y. Supl. 225, 1903. In the last case cited the defendants were restrained from offering to indemnify third persons from any action which might be brought by the plaintiff against them for breach of contract. To threaten third persons with economic pressure—that is, business harm—unless they broke their contracts with the plaintiff was restrained in *Beattie* v. *Callanan*, 81 N. Y. Supl. 413, 1903; and threats of violence for the same purpose were restrained in *Knudsen* v. *Benn*, 123 Fed. 636, 1903.

In the cases cited the obligation which the defendant persuaded the third person to break was a contract with the plaintiff, but Judge Taft, in *Toledo, Ann Arbor and Northern Michigan Railroad Company* v. *Pennsylvania Railroad Company*,[35] applied the principle to a case where the obligation which the defendant was persuading the third person to break was one arising under that clause of the Interstate Commerce Act which obliges a carrier to receive freight coming from another state delivered to it by another carrier.[36]

The remaining count in *Walker* v. *Cronin* raised a more difficult question and is treated at greater length by the court. It charged that the defendants wilfully and without justifiable cause persuaded and induced a large number of persons in the employ of the plaintiffs and others who were about to enter their employment to leave and abandon their employment. In this count, which is also sustained by the court, no contract between the plaintiff and those persuaded to leave is mentioned, neither is the method of persuasion referred to. We have in the opinion of Justice Wells a distinct theory of the proper test of liability in tort for the harmful consequences of an act. The theory is that he who wilfully acts so as to cause harm to another is liable for that harm unless he can show a legal excuse.[37] In the discussion

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[35] 54 Fed. 730, 1893.

[36] Compare *Toledo A. A. and North Michigan Ry. Co.* v. *Penna. Ry. Co.*, 54 Fed. 746, 1893. The recent case of *Carroll* v. *Chesapeake and Ohio Coal Agency Co.*, 124 Fed. 305, C. C. A. 1903, is an example of a further and perhaps questionable extension of the principle of *Lumley* v. *Gye*. The plaintiff was a New Jersey corporation. It entered into a contract with a coal company of West Virginia by which the coal company agreed to mine and furnish coal. The members of a trade union, of which some of the defendants were officers, were, so the bill alleged, by threats preventing those who were desirous of working for the coal company from doing so, and thus prevented the coal company from fulfilling its contract with the plaintiff. The court held that the plaintiff had on the facts alleged a right to bring the bill because of its interest in the contract with the coal company. The case would appear to stand for the proposition that if A has a contract with B, any act of C's which prevents B from fulfilling his contract with A is *primæ facie* a civil wrong to A. *Lumley* v. *Gye* and *Walker* v. *Cronin* seem to go no further than to assert that he who for the purpose of harm to A persuades or forces B to do an act which is a civil wrong to A is liable to A for the harm resulting from B's act.

[37] 107 Mass., page 562.

of this count no mention is made of the fact that the persons persuaded could be considered as the servants of the plaintiff. The case, therefore, may be said to stand for the broad proposition that he who persuades one person not to deal with another is liable to that other if damage result unless he can show a legal excuse. The proposition as stated has been followed in several trade and labor cases.[38]

The way in which the case of *Walker* v. *Cronin* was presented to the court, a demurrer to the allegation that the persuasion was malicious, prevented the decision throwing light on the possible character of a legal justification for such persuasion. The case of the *Johnston Harvester Company* v. *Meinhardt*,[39] however, suggests circumstances which would give the defendant such a justification. In that case the defendants had been employed by the plaintiff company. They struck on account of a reduction in the rate of wages. The defendants, though they did not use any violence, persuaded others from taking their places, and in many cases, in addition to argument, paid the return railway expenses of those who had come from a distance to seek employment with the plaintiff. The plaintiff asked for an injunction to restrain the defendants from interfering with the business of the company. The bill was dismissed, apparently on the ground that the defendants were acting within their legal rights. The case, therefore, in effect holds that one or more persons, who desire to secure employment with a third, may persuade by argument or the offer of money others from taking employment with him without being liable for such persuasion. The right of strikers in such cases to use peaceful persuasion by argument has been repeatedly affirmed.[40]

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[38] *Dickson* v. *Dickson*, 33 La. Ann. 1262, 1881; *Delz* v. *Winfree*, 80 Tex. 400, 1891; *Olive* v. *Van Patten*, 7 Tex. Civ. App. 630, 1894; *Mattison* v. *Lake Shore and M. S. Ry. Co.*, 3 Ohio Sup. and C. P. Decs. 526, 1895; *Graham* v. *St. Charles St. R. R. Co.*, 47 La. Ann. 21*d*. 1895, 217; *Ertz* v. *Produce Exchange*, 79 Minn. 140, 1900; *Moran* v. *Dunphy*, 177 Mass. 485, 1901. Compare further in accord, *Thomas* v. *Cincinnati, N. O. and T. P. Ry. Co.*, 62 Fed. 803, 1894.

[39] 60 How. Pr., 168 N. Y. 1880.

[40] *Rogers* v. *Evarts*, 17 N. Y. Supl. 264, 1891 (but see the affirming opinion in 144 N. Y. 189, 1894); *Sinsheimer* v. *United Garment Workers*, 77 Hun. 215, N. Y. Sup., 1894; *Standard Tube and Forkside Co. Works*

Their right to pay the return fare of those coming from a distance to take their former places, though doubted in one case, has also been recognized.[41] In accord with these cases it has been held in Pennsylvania that an employer may send the names of persons who have left his employ on strike to other employers, requesting them not to employ the strikers until the trouble is settled, without being liable to the strikers for the consequent loss of employment.[42] Again, it has been held that an association of jobbers may persuade by argument manufacturers to sell only to those jobbers and retailers who will agree to maintain, in sales to the retailers and consumers, the price designated by the manufacturers, the whole trade having been much disturbed by the cutting of prices by jobbers and retailers.[43]

If the case of the Johnson Harvester Company illustrates what would be a sufficient legal excuse for persuading a third person to leave the employment or refrain from entering the employment of another, that of *Thomas* v. *Cincinnati, New Orleans and Texas Pacific Railway Company*[44] illustrates circumstances which were regarded as negativing any defence for such persuasion which the

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v. *International Union of Bicycle Workers,* 9 Ohio Dec. 692, 1899; *Kerbs* v. *Rosenstein,* 67 N. Y. Supl. 385, 1900; *Foster* v. *Retail Clerks' International Protective Association,* 78 N. Y. Supl. 860, 1902; *W. & A. Fletcher Co.* v. *International Ass'n of Machinists,* 55 A. 1077, N. J. 1903. Compare in accord *dicta* in the following cases: *United States* v. *Kane,* 23 Fed. 748, 1885, 750; *Consolidated Steel and Wire Co.* v. *Murray,* 80 Fed. 811, 1897, 828; *Plant* v. *Woods,* 176 Mass. 496, 1900; *Erdman* v. *Mitchell,* 207 Pa. 79, 1903, 92.

[41] *Rogers* v. *Evarts,* 17 N. Y. Supl. 264, 1891; *Cumberland Glass Mnf. Co.* v. *Glass Bottle-Blowers' Asso.,* 59 N. J. Eq. 49, 1899, 58.

In *Frank* v. *Herold,* 63 N. J. Eq. 443, 1902, 445, the defendants were restrained "from using the money of the (defendant) association or any other money for the purpose of preventing further employees of the complainants from returning to their work and paying money to such employees to induce them to leave." The decision is apparently due to a novel application of the doctrine of liability for enticing servants which is declared to be in force in New Jersey. The doctrine grew up as a result of one employer enticing the servants of another away from him. The fact that the person enticing needed a servant was no excuse. Here the enticer is another servant, and the purpose of his enticement is to himself obtain service with the plaintiff.

[42] *Bradley* v. *Pierson,* 148 Pa. 502, 1892.

[43] *Park & Sons' Co.* v. *National Wholesale Druggists' Association,* 175 N. Y. 1, 1903, aff. 64 N. Y. Supl. 276.

[44] 62 Fed. 803, 1894.

defendants might otherwise have had. In that case the defendants, who were officers of a union, were attempting to persuade the employees of the plaintiff to leave his employ so that the plaintiff could not fulfil his contract with the Pullman Company. Judge Taft regarded the persuasion, under the circumstances, as a civil wrong to the plaintiff. Another and perhaps more doubtful example of a failure to show a legal excuse for the persuasion of the employees of another to strike is found in the case of the *Old Dominion Steamship Company* v. *McKenna,*[45] where the court held it a civil wrong to the plaintiffs for the defendants, the officers of a union, to call the plaintiffs' employees out on strike to assist the striking employees of the plaintiffs in another state, the persons ordered to leave being satisfied with their own terms of employment. If this decision is not to be regarded as *contra* to that of the Johnson Harvester Company, it is because the law regards one who interferes in the business relations of a man and his employer for his own benefit more leniently than when he interferes for the benefit of some third person.

The cases just discussed raise the question whether one person may interfere with another's business by persuading by argument and offers of money his employees to leave him without being liable to that other for the harm which his persuasion has caused? The case of *Heywood* v. *Tillson,*[46] which came before the Supreme Court of Maine in 1883, was the first to raise the question whether an employer may, by his rules of employment, dictate the relations between his employees and third persons without becoming liable for the harm to such third person which is the natural result of the rules which he has prescribed for his employees. In the case referred to the plaintiff owned a house on an island. This island was the property of the defendant, who operated stone quarries. One of the employees of the defendant occupied the plaintiff's house and paid him rent. Without violating any contract with the

[45] 30 Fed. 48, 1887.
[46] 75 Me. 225, 1883.

plaintiff the occupier could leave the house at any time. The defendant told the occupier that if he continued to occupy the plaintiff's house he would discharge him. In consequence of this threat the occupier left the plaintiff's house and the plaintiff could not, owing to the fact that the plaintiff was the sole employer of labor on the island, secure another tenant. The plaintiff sued at law to recover damages. The court, though there are three opinions, found unanimously for the defendant. The case, like *Bowen* v. *Matheson,* is really a case of boycott. Economic pressure —the threat of discharge—had been brought to bear by the defendant on third persons, his employees, to make such third persons act in a way harmful to the plaintiff. It is also a trade boycott in the sense that it is a boycott of one trader by another trader. It differs, however, from *Bowen* v. *Matheson* in that the persons against whom the pressure is brought are employees of the defendant, not merely persons with whom he deals as a trader. The case stands for the proposition that this kind of a trade boycott is legal. Each of the opinions places the decision on the ground that, irrespective of the plaintiff's motive or purpose, as an employer he had an absolute right to prescribe any rules he saw fit in regard to the persons whom he employed. This broad proposition would at first seem in conflict with the assumption in *Walker* v. *Cronin,* that he who wilfully acts so as to harm another is liable for that harm unless he has a legal excuse. It may be asked, If in *Heywood* v. *Tillson* the plaintiff acts as he did, not from a desire to improve the morals or efficiency of his employees, but from a wanton desire to harm the plaintiff, where is his excuse? The answer is, that perhaps in some cases the excuse may lie in the absolute right of the defendant to do what he has done, meaning by "absolute right" the right to do the act under all circumstances and from whatever motive without being liable to anyone for the harm naturally resulting. The possibility of the existence of such absolute rights is admitted by Justice Wells in *Walker* v. *Cronin.*[47] It cannot be denied, however,

[47] 107 Mass. 564.

that the spirit of the opinions in *Heywood* v. *Tillson* in their emphasis on absolute right is against that of Justice Wells in the Massachusetts case, with his emphasis on the defendant's liability, when he has wilfully caused the harm of which the plaintiff complains, unless he shows a legal excuse. The case of *Heywood* v. *Tillson* has been followed in Tennessee in *Payne* v. *Western and Atlantic Railroad Company*.[48] In this case the question was the sufficiency of a declaration stating that the plaintiff was the owner of a store doing a good business, and the defendants, maliciously conspiring and confederating together, out of malice, ill-will, and wicked feeling, to break up, injure, damage, and ruin the plaintiff in his business, caused to be published an order that any employee who traded with the plaintiff would be discharged. The court sustained the demurrer. Again the absolute right of the defendant to do what he did irrespective of its consequences to the plaintiff is emphasized. "Men must be left," says Judge Ingersoll, "without interference to discharge or retain employees at will for good cause or for no cause, or even for a bad cause, without thereby being guilty of an unlawful act *per se*."[49] A demurrer to a practically identical statement was, however, overruled by the Texas Court of Civil Appeal[50] and by the Supreme Court of Louisiana.[51] That an employer may make rules for the guidance of his employees where such rules have some relation to the possible improvement of their service to him, even though such rules adversely affect the business of third persons, without being liable to such third persons, can hardly be questioned. The Texas and Louisiana cases do not throw any doubt on this. The Texas court expressly points out that "the petition excludes the idea that the action complained of was taken for any legitimate purpose."[52] But the absolute right of an employer to influence, through his

[48] 13 Lea. 507, Tenn., 1884.
[49] Page 508.
[50] *International and Great Northern R. R. Co.* v. *Greenwood*, 2 Texas Civ. App. 76, 1893.
[51] *Graham* v. *St. Charles Street R. R. Co.*, 47 La. Ann. 214, 1895.
[52] Page 81.

rules of employment, the action of his employees towards third persons may be regarded as open to doubt.

It is interesting to note that the earliest trade and labor cases in this country are not cases in which the defendants are alleged by the plaintiff to have used violence to prevent third persons from working for him or from becoming his customers. That violence to a man's employees or customers for the purpose of driving them away from him gives him a good cause of action has long been admitted. In the case of *Garrett* v. *Taylor*,[53] a case decided in 1620, it was held that a stonemason could bring an action against one who drove away his workmen by threats of violence. Lord Holt as early as 1707, in the case of *Keeble* v. *Hickeringill*,[54] says: "But suppose, Mr. Hickeringill, that if one should lie in the way with guns, and fright the boys from going to school, and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars."[55] The right of the plaintiff in such cases does not arise from the loss of the services of the servant, but from the obstruction to the business. That the defendant injured the plaintiff's employee is not enough. He must have known he was the plaintiff's employee and injured him for the purpose of annoying the plaintiff.[56] The judges in the recent cases arising out of controversies between capital and labor, where the defendants used violence or the threat of violence to the employees or customers of the plaintiff, usually assume the liability of the defendants, the opinions merely dealing with the propriety of the equitable remedy of injunction. The earliest case, however, *United States* v. *Kane*,[57] came before the court, not as an original bill for an injunction, but on the motion of a receiver of a railroad appointed by the court to commit the defendants for contempt of court in hindering the operation of the road by persuading the employees of the

[53] Croke, James, 567, 1620.
[54] 11 East. 574, note 1.
[55] He cites several cases from the Year Books in support of the assertion that "Action upon the case lies against one that shall by threats fright away his tenants at will." 9 H. 7, 8 appears to support this assertion. See also the writ given Rostal, 662.
[56] *Taylor* v. *Neri*, 1 Esp. 386, 1795.
[57] 23 Fed. 748, 1885.

receiver through threats of violence not to obey his, the receiver's, orders in reference to running engines. Justice Brewer committed the defendants to jail. The case stands for the proposition that where a railroad or other property is in the custody of a receiver appointed by the court it is a contempt of court to do any act which would be tortious if the receiver had been the owner of the property, provided the act interrupts the receiver in his management of the property. An action similar to that taken by Justice Brewer in this case was taken by him in the case of *In re Doolittle*,[58] occurring about the same time. Similar commitments for contempt have since been made in at least two cases.[59] No case has thrown any doubt on the correctness of the procedure. It certainly may be defended as a logical application of the old English Chancery practice of committing anyone for contempt who married a ward of Chancery without the consent of the Chancellor. At the same time the obstruction of a servant of an officer of a court, not in the presence of the court, in carrying out an order not of the court but of the officer in discharging his duty to the court, can never be more than constructively a contempt of the court itself. In view of the great amount of property which is under the control of receivers, the case of *United States* v. *Kane* was a vast practical extension of the field of possible constructive contempts. The writer cannot but feel that, in view of the right of a receiver, situated as the receiver in *United States* v. *Kane,* to apply for an injunction to restrain tortious interference with his employees while in the discharge of their duties, that it is an unnecessary extension, fraught with possibilities of mischief.

The question whether a court of equity will, at the instance of an employer, restrain outsiders from trespassing on his property for the purpose of intimidating his workmen, first arose in 1887 in the case of *New York, Lake Erie and Western Railroad Company* v. *Wenger*.[60] The equitable

[58] 23 Fed. 544, 1885.
[59] *In re Wabash R. Co.*, 24 Fed. 217, 1885; *Thomas* v. *Cincinnati, N. O. and T. P. Ry. Co.*, 62 Fed. 803, 1894.
[60] 9 Ohio Dec. Rept. 815, 1887.

jurisdiction was affirmed. The next year the Supreme Court of Massachusetts, in *Sherry* v. *Perkins*,[61] followed the decision if not the reasoning of Vice-Chancellor Malins in the English case of *Springhead Company* v. *Riley*,[62] and restrained the publication of notices and banners, not in themselves libellous, but which were part of a scheme through threats of violence to persuade third persons from seeking employment with the plaintiff. The same year, in Pennsylvania, in the case of *Brace Brothers* v. *Evans*,[63] the court issued an injunction to restrain the defendant from interrupting the plaintiffs' business by persistently annoying and intimidating their customers. These decisions have since been followed in a large number of cases, and the jurisdiction of a court of equity to restrain all forms of violence or threats of violence to a person's employees or customers is now as well settled as the fact that such violence is a civil wrong to the plaintiff.[64] The objection often made in these cases, that violence is a crime and a court of equity has no

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[61] 147 Mass. 212, 1888.
[62] L. R. 6 Eq. Cas. 551, 1868.
[63] 18 Pitts. L. J. N. S. 399, 1888.
[64] See *Cœur d'Alene Consolidated Mining Co.* v. *Miners' Union*, 51 Fed. 260, 1892; *Murdock* v. *Walker*, 152 Pa. 595, 1893; *Blindell* v. *Hagan*, 54 Fed. 40, 1893; *Lake Erie and W. Ry. Co.* v. *Bailey*, 61 Fed. 494, 1893; *Wick China Co.* v. *Brown*, 164 Pa. 449, 1894; *Davis* v. *Zimmerman*, 91 Hun. 489, N. Y. Sup. 1895; *Hamilton-Brown Shoe Co.* v. *Saxey*, 131 Mo. 212, 1895; *Vegelahn* v. *Guntner*, 167 Mass. 92, 1896; *Mackall* v. *Ratchford*, 82 Fed. 41, 1897; *Cook* v. *Dolan*, 6 Dist. R. 524 Pa. C. P., 1897; *O'Neil* v. *Behanna*, 182 Pa. 238, 1897; *American Steel and Wire Co.* v. *Wire Drawers' and Die Makers' Union*, 90 Fed. 608, 1898, 617, 618; *Beck* v. *Railway Teamsters' Union*, 42 L. R. A. 407, Mich., 1898, 419; *Cumberland Glass Mnf. Co.* v. *Glass Bottle-Blowers' Asso.*, 59 N. J. Eq. 49, 1899; *Otis Steel Co.* v. *Local Union*, 110 Fed. 698, 1901; *Southern Ry. Co.* v. *Machinists' Local Union*, 111 Fed. 49, 1901, 58; *Allis Chalmers Co.* v. *Reliable Lodge*, 111 Fed. 264, 1901; *Reinecke Coal Min. Co.* v. *Wood*, 112 Fed. 477, 1901; *Herzog* v. *Fitzgerald*, 74 N. Y. App. 110, 1902; *Beaton* v. *Tarrant*, 102 Ill. App. 124, 1902; *United States ex rel. Guaranty Trust Co.* v. *Haggerty*, 116 Fed. 510, 1902; *Ex parte* Richards, 117 Fed. 658, 1902; *Union Pac. Ry. Co.* v. *Ruef*, 120 Fed. 119, 1902, 129; *Frank* v. *Herold*, 63 N. J. Eq. 443, 1902, 445; *Jersey City Printing Co.* v. *Cassidy*, 53 Atl. 230 N. J., 1902; *W. P. Davis Mach. Co.* v. *Robinson*, 84 N. Y. Supl. 837, 1903; *Christensen* v. *Kellogg Switchboard and Supply Co.*, 110 Ill. App. 61, 1903; *Horseshoers' Protective Asso.* v. *Quinlivan*, 83 N. Y. App. 459, 1903; *W. & A. Fletcher Co.* v. *International Asso. of Machinists*, 55 A. 1077, N. J. Eq., 1903; *Underhill* v. *Murphy*, 78 S. W. 482, Ky., 1904.

jurisdiction to restrain a crime, has been either disregarded, or met with the reply that equity takes jurisdiction, not because the act is a crime, but in spite of it, to protect property. To the constitutional objection that the injunction deprives the alleged criminal of a trial by jury it has been replied that if the violence is committed after notice of the injunction, the defendant is not put in prison for the crime, but for contempt of the order of the court, and that to deprive the court on constitutional grounds of the right to protect property by injunction where the wrongful act restrained was a crime, would be to assert that a man had a constitu-

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In *Ex parte* Haggerty, 124 Fed. 441, 1902, the court thought that a mortgagee of the mining plant of the employer had sufficient interest to file the bill. *Sed quare* if physical damage was not threatened to the property.

In *Beck* v. *Teamsters' Protective Union,* 118 Mich. 497, 1898, the defendants, as part of a scheme to intimidate the customers of the plaintiff, issued certain written statements, which statements were also libels on the plaintiff. The court restrained the publication. See page 527. In this case, as in several other cases, the court of equity restrains a written publication. It has frequently been objected that this is beyond the jurisdiction of the Court of Chancery. That equity has not power, unless the power is, as in England under the Judicature Act, expressly conferred by statute, to restrain a libel is admitted. But a single act, like publishing to the world a written or printed sentence, may cause harm in several different ways, and each way in which the act causes harm may be a distinct tort. Thus the writing in *Beck* v. *Teamsters' Protective Union* has a libel in that by false statements it held the plaintiff up to the contempt of mankind. But the publication was so worded that it also intimated to those who read it that the publishers would see to it that harm would result to those who dealt with the plaintiff. In short, the act of publication was an act in furtherance of a boycott or illegal interference between the plaintiff and those with whom he dealt. Equity had jurisdiction to restrain the illegal interference in business, but no jurisdiction to restrain the libel. In restraining the publication the court takes the position that where an act amounts to a tort which equity has jurisdiction to restrain, the mere fact that the act is also a libel over which equity has no jurisdiction does not deprive equity of its jurisdiction. This position was not new. It had already been taken in *Sherry* v. *Perkins,* 147 Mass. 212, 1888, 214; *Casey* v. *Cincinnati Typo. Union,* 45 Fed. 135, 1891, 144, 145; *Cœur d'Alene Consolidated Mining Co.* v. *Miners' Union,* 51 Fed. 260, 1892, 267. Compare *Emack* v. *Kane,* 34 Fed. 46, 1888, 50.

It has been held, however, that in order to secure the injunction the plaintiff must be a trader, and that a beneficial society has not sufficient interest in its employees to have them protected by an injunction from threats of physical harm: *Atkins* v. *W. & A. Fletcher Co.,* 55 A. 1074, N. J. 1903. *Sed quare.* Compare dissenting opinion of Ingraham, J., in *Horseshoers' Protective Asso.* v. *Quinlivan,* 83 N. Y. App. 439, 1903, 464, and the decision in *Snow* v. *Wheeler,* 113 Mass. 179, 1873.

tional right to commit a crime in order that he might enjoy the inestimable privilege of trial by jury.[65]

In *Bowen* v. *Matheson*[66] the Supreme Court of Massachusetts, as we have already seen, held that no action lay for harm the result of a boycott. In that case, however, the boycott was instituted by the plaintiffs' rivals in trade for the purpose of advancing their trade at the expense of the defendants. In 1890 the first boycott case in which the defendants were laborers and ex-employees of the plaintiff and the friends of such employees came before Judge Taft, who was then sitting in the Superior Court of Cincinnati. The case is that of *Moores* v. *The Bricklayers' Union*.[67] The defendants, who were bricklayers, were members of a union, one of the objects of which was the improvement of their condition by united action on the subject of wages. The union requested the plaintiffs, who were contracting bricklayers, to pay a fine imposed by the union upon one of their employees who was a member of the union, and to reinstate an apprentice who had left, and discharge another apprentice. The plaintiffs refused. The defendants sent letters to the plaintiffs' customers, saying that members of the union would not work on material supplied by the plaintiffs. The threat was effective. Judge Taft held the defendants' acts illegal, approaching the subject from the same general point of view as *Walker* v. *Cronin*. The boycott harmed the plaintiffs and the defendants had in their motive or purpose no just cause or excuse. The case decides that a boycott for the purpose of punishing an employer for not obeying a rule of a union, and through that punishment deter other employers from violating the rule, is illegal and actionable if harm results. The case was a case at law. The more recent English cases

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[65] For a full discussion of this question see *Hamilton-Brown Shoe Co.* v. *Saxey*, 131 Mo. 212, 1895, 220. Compare, in accord, the opinion of Beatty, J., in *Cœur d'Alene Consolidated Mining Co.* v. *Miners' Union*, 51 Fed. 260, 1892, 264-5; of Wood, J., in *United States* v. *Debs*, 64 Fed. 724, 1894; of Brewer, J., in *In re Debs*, 158 U. S. 564, 1894, 593–4. See also *Toledo A. A. and N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730, 1893, 739; *Lake Erie and Western Ry. Co.* v. *Bailey*, 61 Fed. 494, 1893; *Consolidated Steel and Wire Co.* v. *Murray*, 80 Fed. 811, 1897, 827.

[66] 96 Mass. 499, 1867.

[67] 23 Ohio Wk. Bul. 48, 1890.

of *Temperton* v. *Russell*[67a] and *Quinn* v. *Leathem*[68] are similar, and the decisions are in accord with Judge Taft's decision.

In the following year another case involving the legality of a boycott came before the Federal Court in Cincinnati. This is the case of *Casey* v. *Cincinnati Typographical Union*.[69] The plaintiff, the owner of a newspaper, refused to unionize his office. The defendants, who were officers of the union, sent letters to those who advertised in the plaintiff's paper, warning the advertiser that if they continued their advertisements in the paper the writers would induce all persons connected with organized labor to cease to deal with them. The threat was effective. The court issued an injunction against the continued circulation of the circulars. The case not only stands for the proposition that an illegal boycott can be restrained by a court of equity, but that the desire of a union to harm an employer of labor because he has refused to enter into direct business relations with it, is no excuse for persuading by means of threat of business harm the employer's customers to leave him. Judge Sage in his opinion goes further than this, practically taking the position that all boycotts are illegal irrespective of the purpose of the defendants. He says: "Instead of fair although sharp and bitter competition, as is contended by counsel, it was an attempt by coercion to destroy all competition affecting the union, * * * and allow it to regulate prices for him, and determine whom he should employ, and whom discharge."[70] The case of *Casey* v. *Cincinnati Typographical Union* has been followed in two cases presenting identical facts, *Barr* v. *Essex Trades Council*,[71] and *Mathews* v.

[67a] (1893) 1 Q. B. 715.

[68] (1901) A. C. 495. This case differs slightly from any other case on either side of the Atlantic. The economic pressure used was the threat to withdraw from the service of the customers of the plaintiff if those customers continued to deal with the plaintiff. In the other cases the defendants were customers of the customers of the plaintiff, not employees of the customers of the plaintiff.

[69] 45 Fed. 135, 1891.

[70] Page 143.

[71] 53 N. J. Eq. 101, 1894.

Shankland.[72] In the former case the theory of injury without excuse is emphasized.[73] In *Matthews* v. *Shankland*, as in *Casey* v. *The Cincinnati Typographical Union*, the element of coercion in the act itself, the boycott or attempt to bring economic pressure on third persons, seems to have been, in the opinion of the court, the essence of the offence.[74]

Another boycott case is *Hopkins* v. *Oxley Stave Co.*[75] The plaintiff company was engaged in making barrels and casks. They introduced into their establishment a new hooping machine, which apparently enabled them to do away with a number of their employees. These employees were members of a union known as the Coopers' International Union of North America. There was a certain affiliation between this union and other unions, members of what was known as the Trades Assembly of Kansas City. Representatives of these bodies notified the plaintiff company that they would establish a boycott against the company if they continued to use the hooping machine, and in the prosecution of this boycott would notify all persons using the plaintiffs' barrels and casks that the members of the unions, consisting of a large number of persons in all parts of the United States, would refuse to buy any goods packed in barrels or casks made by the company. The plaintiffs asked and obtained an injunction restraining the defendants, the officers of the associations, putting in force this threatened boycott. The illegality of the contemplated acts, in the mind of Judge Thayer, who delivered the opinion, is primarily the unlawful interference in the plaintiffs' right to conduct their business as they see fit, and the unlawfulness of the interference depends, as in

[72] 56 N. Y. Supl. 123, 1898.

See also *Gray* v. *Building Trades Council*, 97 N. W. 663, Minn., 1903, for a case in which the defendants instituted a boycott against the plaintiff for the apparent purpose of punishing the plaintiff for not running his business in the way desired by a union of employees of the trade in which the plaintiff was engaged. The boycott was restrained. In accord: *Martin* v. *McFall*, 55 A. 465, N. J., 1903.

[73] Pages 117, 118.

[74] Page 128. In *Longshore Printing Co.* v. *Howell*, 26 Ore. 527, 1894, an injunction to restrain an alleged boycott similar to that in *Casey* v. *Cincinnati Typ. Union* was denied because the facts failed to show such a persistent persecution of the plaintiff as to warrant an injunction.

[75] 83 Fed. 912, C. C. A., 1897, aff. *Oxley Stave Co.* v. *Coopers' Int. Union*, 72 Fed. 695, 1896.

Casey v. *Typographical Union,* on the element of coercion. "The customers of the plaintiffs are," he says, "compelled to surrender their freedom of action." The dissent of Judge Caldwell, the only dissent in what we may call labor boycott cases, is based on the opinion that as each of the members of the defendant associations had a right to deal or not to deal with whom they chose, they had a right to refuse to deal with the plaintiffs' customers because they used the plaintiffs' barrels, and that there was not a conspiracy, because there was not an agreement among the defendants to do an unlawful act. Under the facts of the case we may regard the court as at least deciding that defendants cannot escape liability for the harm resulting from their boycott of the plaintiff by showing that they are members of a union and that their purpose in instituting the boycott was to compel the plaintiff to refrain from adopting a particular machine which they, the defendants, believed to be inimical to the interests of the plaintiffs' employees.

Comparing these labor boycott cases with the trade boycott cases, we find that the question whether a boycott of one trader by rival traders is legal is a question in which there is a conflict of authority, but a boycott of a trader by laborers or others who are not rival traders has invariably been held illegal. The same line of distinction has been followed in England.[76] The only justification for the distinction lies in the fact that in the labor boycott cases the connection between the acts of the defendants and their own advancement is sometimes one degree more remote than in the boycott by rival traders. In the trade cases the immediate purpose of the defendants is usually to establish a monopoly through which their own economic advancement is to be secured. In the labor cases the immediate purpose is

[76] Compare *Temperton* v. *Russell* (1893), 1 Q. B. 715, a boycott by laborers, with *Mogul Steamship Co.* v. *McGregor,* 23 Q. B. 598, aff. in (1892) A. C. 25, where the defendants, being rival traders of the plaintiffs, refused to take freight from shipping agents who dealt with the plaintiffs. This part of the case is not discussed by the judges. It is assumed that the plaintiffs are without remedy for the harm resulting from such acts. See also in accord *Scottish Co-operative Society* v. *Glasgow Fleshers' Association,* 35 Sc. L. R. 645, 1898, and opinion of Lord Lindley in *Quinn* v. *Leathem* (1901), A. C. 495, page 539.

usually to punish the plaintiff, and through the example of his punishment to make him and others adopt certain rules in the conduct of business, which rules will in the end be beneficial to the economic position of the defendants. The connection between the boycott and the economic advancement being less clear to the judges, there is a tendency to regard the defendants in labor boycotts as persons who have intermeddled in the plaintiff's business without excuse. The distinction, in view of the real facts, is a narrow one, and the writer does not believe it will stand analysis. The boycott is an appeal to force, not an appeal to reason. The force is not physical force, but is none the less an attempt to coerce the will of third persons, so that they will act in a way prejudicial to the plaintiffs' interests. The purpose of self-advancement in business or trade is one to be encouraged by the law, but it should not be sufficient to excuse harm to others through the coercion of their customers. This conclusion is a criticism, not of the labor boycott cases, but of such decisions as *Bowen* v. *Matheson,* which have held a boycott undertaken by the rivals in business of the person boycotted as legal.

In the boycott cases just discussed, as in the earlier case of *Bowen* v. *Matheson,* the person boycotted was a trader, using the word trader in its broad sense as including those who make and sell goods as well as those who merely sell. The harm of which the plaintiff complains in this class of cases is an injury to his trade. He has been deprived of a market for the sale of his goods. The case of *Lucke* v. *The Clothing Cutters' Union,*[77] decided by the Court of Appeals of Maryland in 1893, seems to have been the first case not affected by statute in which the boycott was directed by workmen against a workman for the purpose of depriving him of a market for his labor.[78] The plaintiff was a cutter

[77] 77 Md. 396, 1893.

[78] The case of *Mayer* v. *Journeymen Stone-Cutters' Association,* 47 N. J. Eq. 519, 1890, is an earlier case, but that was decided under a statute. The New Jersey Act of 1883, Supp. Rev., page 774, par. 30, provides that "it shall not be unlawful for any two or three persons to unite, combine, etc., to persuade, advise or encourage by peaceable means any person or persons to enter into any combination for or against leaving

in the employ of Rosenfield Brothers; the defendant an incorporated labor union. Rosenfield Brothers had every desire to retain the plaintiff in their employ, though they were under no contract to do so, when they received a letter from the secretary of the union stating that unless they discharged the plaintiff their shop would be declared a non-union shop. Solely in consequence of the receipt of this letter Rosenfield Brothers discharged the plaintiff. Had they not done so all persons connected with organized labor would have refused to buy their goods, and their other laborers, who were members of the union, would have been ordered out by the organization. The court was of opinion that these facts constituted a cause of action; in other words, that what we may call the fellow-workman boycott is illegal or actionable if harm results. It will be noted that the purpose of the defendants in establishing the boycott was to obtain a practical monopoly of the labor market in the cutting trade in the city. Through this monopoly they intended to improve their economic position as workers. The case decides that it is actionable for two or more persons, workers in a particular trade, in order to obtain a monopoly of the work in that trade for themselves, to threaten to leave or leave the employment of anyone who employs another, provided that other is actually deprived of employment as a result of acts done in pursuance of the

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or entering into the employment of any person or persons or corporation." Vice-Chancellor Green held that under this act a number of laborers could combine to leave their employment if the employer hired any non-union man, and the refusal of an employer to employ a non-union man because of this threat did not give the non-union man a cause of action against the members of the union. Whether this case is now law in the jurisdiction, though the statute has not been repealed, may be regarded as doubtful. Vice-Chancellor Green declared in *Barr* v. *Essex Trades Council,* 53 N. J. Eq. 101, 1894, a case of the boycott of a trader by laborers, that a boycott if resulting in harm was actionable, and that he had decided the earlier case as he did because of the statute. But in the more recent case of *Frank* v. *Herold,* 63 N. J. Eq. 443, 1902, Vice-Chancellor Pitney declares that the Act of 1883 "renders innocent, as against the public, an act which, previous to its passage, was a misdemeanor and punishable by indictment." "It does not," he adds, "take away or in any wise affect any private rights which may arise out of the acts which are legalized by that legislation," pages 447-8. He furthermore intimates that if the Act of 1883 affected private rights it is unconstitutional.

combination. The case has been followed in *Plant* v. *Woods*,[79] a Massachusetts case, and *Erdman* v. *Mitchell*,[80] a Pennsylvania case. Both of these cases, being cases in equity, stand for the further proposition, that a Court of Chancery has jurisdiction to restrain by injunction such a boycott.[81] Justice Holmes dissented in *Plant* v. *Woods*. He believed that the monopoly of the labor market of one trade by one union was a means by which the rate of wages in that trade could be materially advanced, and he thought that the purpose of the defendants in desiring a monopoly being justified by this fact, gave them a legal excuse for the harm which their acts inflicted on the defendants.[82] The courts in New York have also taken a position in regard to these fellow-labor boycotts which is at variance with that adopted in Maryland, Massachusetts, and Pennsylvania.[83] The first case in that State in which the opinion is expressed that a laborer, boycotted by his fellow-laborers, has suffered no legal injury is *Davis* v. *United Portable Hoisting Engineers*.[84] In that case the plaintiff, who was a hod-hoisting engineer, asked that the defendants, the officers and members of a union, be restrained from in any manner preventing the plaintiff from obtaining employment. In the opinion of the majority of the court the plaintiff failed to show that he had ever been discharged as a result of the acts of the defendants. The only employer testifying in the case swore that he had only employed the plaintiff until he could obtain a union man, not that he had discharged him because of the threats of the union. Judge Patterson, however, does say: "There can be no doubt that members

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[79] 176 Mass. 492, 1900.

[80] 207 Pa. 79, 1903. It was also followed in New York in the case of *Curran* v. *Galen*, 152 N. Y. 33, 1897. This case has, apparently, been overruled by the case of *National Protective Asso.* v. *Cumming*, 170 N. Y. 316, 1902, see *infra*.

[81] To the same effect see the English case of *Giblan* v. *National Amalgamated Labourers' Union* [1903], 2 K. B. 600, Ct. of App.

[82] Page 505.

[83] There is also a case in the Appellate Court of Indiana, *Clemmitt* v. *Watson*, 14 Ind. App. 38, 1895, which is *contra* to *Lucke* v. *Clothing Cutters' Union*. But see *Jackson* v. *Stanfield*, 137 Ind. 592, 1893.

[84] 28 App. Div. 396, N. Y., 1898.

of trade unions, as well as other individuals, have a right to say that they will not work with persons who do not belong to their organizations, and whether they say it themselves or through their organized societies makes no difference. They have a right by that method to secure employment for their own members." [85] Judge Rumsey dissented, because he believed that the coercion exercised by the defendants had caused the plaintiff's discharge, and that this coercion for the purpose of depriving another of employment was unlawful.[86] Following the opinion of Judge Patterson, if not the actual decision in this case, the special term of the Supreme Court in *Tallman* v. *Gallard* [87] refused to issue an injunction *pendente lite* in a case in which the plaintiff set out that he had been discharged because of the threats of the defendants that unless his employer discharged him the defendants would bring on a general strike of the other employees. Judge Giegerich, quoting the sentence we have given from Judge Patterson's opinion in *Davis* v. *Engineers*, says: "Applying the foregoing principles to the case at bar, it is clear that the means used by the defendants were lawful." The same judge took a similar action in *Reform Club of Masons and Plasterers* v. *Laborers' Union Protective Society*.[88] The Court of Appeals, though by a

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[85] 399.

[86] Page 399. He regards the English case of *Allen* v. *Flood* (1898), A. C. 1, as having been decided on similar facts and as holding that one man is not liable to another, though he has caused that other's discharge by economic pressure on his employer. Judge Rumsey regards the English decision as erroneous. He was mistaken, however, in the nature of the decision in *Allen* v. *Flood*. Though the question discussed in our text was discussed in that case, under the view of the facts adopted by the majority of the House of Lords, the case merely stands for the obvious legal rule that a man who has not caused the discharge of another from his employment is not liable for the harm to him resulting from such discharge. See statements by members of the House in *Quinn* v. *Leathem* (1901), A. C. 495. The lower courts in England, when the decision in *Allen* v. *Flood* was first announced, interpreted it in the same manner as Judge Rumsey. See *Huttley* v. *Simmons* (1898), 1 Q. B. 181, also the modification made in the injunction issued in *Lyons* v. *Wilkins*, 78 L. T. Rep. 618, 1898, s. c. 67 L. J. Ch. 383.

[87] 57 N. Y. Supl. 419, 1899. This decision and the opinion of Patterson, J., in *Davis* v. *United Portable Hoisting Engineers*, 28 App. Div. 396, 1898, 397, just quoted, appears to be *contra* to the earlier New York case of *Curran* v. *Galen*, 152 N. Y. 33, 1897.

[88] 60 N. Y. Supl. 388, 1899.

divided court, confirmed these cases in *National Protective Association of Steam-fitters and Helpers* v. *Cumming*.[89] In this case one McQueed was president of the plaintiff association, an incorporated labor union. He brought the action for himself and the other members of his union against the officers and members of several allied unions connected with steam work in the erection of buildings, and probably with other building-trade unions. The complaint alleged that the defendants were empowered to go round to the different buildings in which their members were employed, and if they found any non-members working on the building, to demand their discharge. That one of the members of the plaintiff corporation was engaged on a building when the defendants caused his discharge by threatening, that unless he was discharged they would order a strike of the members of the organizations they represented who were working on the building. Chief-Justice Parker, who wrote the opinion of the court, rests his decision on the absolute right of a man or body of men to work or not to work. From this principle it of course follows that the defendants in the case before him had a right to threaten to do what they had an absolute right to do. It will be noted that the basis of this decision in favor of the defendants is radically different from that expressed by Justice Holmes in *Plant* v. *Woods*. Justice Holmes starts with the proposition that to wilfully act so as to cause harm to another gives that other a right of action. He then finds in the purpose of the defendant a legal privilege or excuse. Justice Parker, on the other hand, lays emphasis on the existence of absolute rights and expressly disapproves of the growing tendency to regard motive or purpose as an element tending to determine the legal character of an act.[90] The dissenting opinion of Justice Vann expresses still another way of deciding the question at issue. To him, as to Judge Sage in *Casey* v. *Cincinnati Typographical Union*,[91] the element of coercion is the factor which makes the defendants' acts unlawful.

[89] 170 N. Y. 315, 1902, aff. 53 App. Div. 227, 1900.
[90] Page 326.
[91] 45 Fed. 135, 1891, note 69.

The same conflict of opinion which appears to exist in these cases where laborers attempt to boycott laborers, also appears in the two reported cases in which the defendants, not being laborers, procured the plaintiff's discharge by bringing economic pressure to bear on his employer. In *Raycroft v. Tayntor*[92] the plaintiff was employed by a person who had a license to work a quarry which he had received from the defendant, the superintendent for the owner of the quarry. The plaintiff and the defendant quarrelled, and as a result of this quarrel the defendant told the plaintiff's employer that he would revoke his license unless he discharged the plaintiff. The court held that the defendant had an absolute right to revoke or threaten to revoke the license without being liable for the resulting harm to the holder of the license or anyone else. On the other hand, the Supreme Court of Illinois, in *London Guarantee Company* v. *Horn*,[93] seem to come to an opposite conclusion. In this case an insurance company made a contract with the plaintiff's employer to indemnify the employer from all loss by reason of claims for damages from any of his employees injured while in his employ. The plaintiff was injured and sued his employer. The insurance company by its contract with the employer became the real defendant in the suit. The plaintiff refused an offer of settlement on the part of the insurance company, and the latter's agent told the plaintiff's employer that unless he discharged him the insurance company would cancel the contract of insurance. The company had a right to do this on five days' notice, but whether the threat was to cancel at once or on five days' notice is doubtful. At any rate, it was effective: the plaintiff was discharged. The majority of the court held he had a good cause of action against the insurance company. Two judges dissented on the ground that the threat of the insurance company to cancel the contract with the plaintiff's employer was to cancel it in five days, and this they had an absolute right to do from whatever motive.

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[92] 68 Vt. 219, 1896.
[93] 206 Ill. 493, 1904, aff. 101 Ill. App. 355.

The method of approaching a question of alleged tort, which presumes that one is liable for harm which is the natural consequence of a wilful act, appeals to the writer. A discussion of the proper method of determining a doubtful question of torts is not, however, the object of this article.[94] Assuming the method indicated to be correct, he cannot think that the desire for self-advancement through securing the monopoly of the labor market is no more a legal justification in the fellow-workmen boycott cases than the desire for self-advancement through the monopoly of the market for particular goods is an excuse for a trade boycott, or the adoption of a rule of employment desired by a union is an excuse for its members inaugurating a labor boycott against an employer who will not adopt it, even though its adoption will probably tend to the economic advancement of the laborers. In short, the writer believes that the position that a person should have a civil action for harm the result of a boycott is sound, and should be generally applied to all the three classes of boycott so far considered. Self-advancement alone should not be a legal excuse for harm the result of a boycott, whether that self-advancement is worked out indirectly through monopoly or directly, as in the Illinois case just discussed.

This is not saying, however, that there may not exist legal justifications for a boycott. An example of a legal justification is illustrated by the case of the *Continental Company* v. *Board of Fire Underwriters*,[95] a case decided by Judge, now Justice, McKenna. This was a trade boycott case. The defendants were companies engaged in fire insurance. They notified their agents that they must cease to represent the company in the association if they represented the plaintiff company. An injunction to restrain this threat is denied, though the alleged act of threatening to refuse to deal with those who insured in the plaintiff company is declared illegal and restrained.[96] It is evident

[94] The writer has discussed this question in an article on, "The Closed Market, the Union Shop, and the Common Law," in the April number of the current volume of the *Harvard Law Review*.

[95] 67 Fed. 310, 1895.

[96] Pages 312, 323.

that there is a legal justification for refusing to deal with an agent for the sale of one's goods who represents a business rival.[97] An agent is in a different position than a customer. He is supposed to push the business of his principal. In the insurance business one man may represent several companies, but whether the fact that he represents one company is or is not inimical to the interests of a rival company which he also wants to represent is for the rival company to determine. The case is not unlike the case of the employer who determines that for the good of his business his employees should not deal with a particular store, because dealing with the store tends, in the opinion of the employer, to adversely affect the character of his employees as employees. Neither is the case unlike that of the laborer who refuses to work with another laborer because he believes him to be incompetent and therefore, owing to the character of their work, likely to jeopardize his life or adversely affect the character of his output. All these cases are boycott cases in the sense that economic pressure is brought on third persons to make them act in a way harmful to others; but in each case those who inaugurate the boycott have a legal excuse for the harm done to the boycotted person.

The earliest and the first case which we have discussed, *Hunt* v. *Simonds*,[98] was a case of trade strike; that is, the united refusal of two or more traders to deal with a third. It was not, however, until 1892 that a case involving an agreement among several employers not to employ certain workmen came before a court. In *Worthington* v. *Waring*[99] the plaintiffs, who were weavers, alleged that the manufacturers of Fall River had agreed among themselves not to employ anyone who, being an employee of one of them, had gone out on strike; that the plaintiffs had left the defendants' employ on strike, and the defendants had in pursuance of the agreement blacklisted them and sent their names to other manufacturers in Fall River.

[97] It may be possible to support the English case of *Mogul S. S. Co.* v. *McGregor*, 23 Q. B. D. 598 (1892), A. C. 25, on this ground.
[98] 19 Mo. 583, 1854.
[99] 157 Mass. 421, 1892.

The prayer of the petition was that such blacklists or other devices used for the purpose of preventing the plaintiffs' employment be withdrawn and destroyed. What benefit the plaintiffs could obtain by any possible action of a court of equity, their names having already been sent to other manufacturers, parties to the agreement, is not clear. The court, while expressly refraining from dealing with the question whether the acts of the defendants constituted a cause of action, place their refusal to grant relief on the ground that the plaintiffs are attempting to enforce a mere personal as distinguished from a property right and that equity only protects rights of property. This ground, it is submitted, is hardly tenable. The reasonable expectation of a trader that he will be able to sell his goods to his old customers has been protected by courts of equity from the wrongful interference of third persons on the ground that a man's business reputation is incorporeal property. It would appear that the laborer's reasonable expectation of securing employment should, on the same ground, be equally entitled to the Chancellor's protection. A few years after the decision in *Worthington* v. *Waring,* the same court in the case of *Plant* v. *Woods* [100] protected by a decree in equity this right against what they regarded as the wrongful interference of fellow-workmen. Apart from the question of equitable jurisdiction, whether an agreement among several manufacturers to send each other the names of employees who go out on strike and to keep a blacklist of the same, is actionable if harm results to the striker has yet to be expressly decided.[101] Judge Rogers in *Boyer* v. *Western Union Telegraph Com-*

[100] 176 Mass. 492, 1900.

[101] In *Mattison* v. *Lake Shore and South Mich. R. R. Co.,* 3 Ohio, Dec. Sup. and Com. Pleas, 526, 1895, the plaintiff was the discharged employee of the defendant. He set forth in his declaration that the defendant maliciously interfered with his rights to earn his living as a railroad employee by putting in force certain "blacklists" rules against him; but he did not explain the nature of these rules, and one is uncertain whether he sued for a malicious discharge or a malicious persuasion of others not to employ him. The court overruled the demurrer of the defendants. In *McDonald* v. *The Illinois Cent. R. R.,* 187 Ill. 529, 1900, the plaintiff did not allege any agreement not to employ him among several employers, or that he failed to get employment because of any action on the part of his old employer. The court sustained the defendant's demurrer.

pany [102] takes the position that where there is no contract between an employer and his men he may legally discharge them for any reason, and inform others, who inquire, the reason for the discharge. As he furthermore takes the position that there is no such thing as an illegal conspiracy to do a lawful act," [103] it is probable that he would consider an agreement among several employers to blacklist particular workmen as legal.[104]

The last form of strike, or agreement among several persons not to deal with another, to come before the civil courts, was the labor strike, the kind of strike to which the word itself is usually confined.[105] In *Arthur* v. *Oakes,*[106] a Federal case arising in 1894, the receiver of a railroad secured from the circuit court [107] an injunction which Justice Harland thought restrained the employees from quitting the service of the company in a body. He struck out this part of the injunction on the express ground that equity has no jurisdiction to force one man to remain in the personal service of another. Merely the jurisdiction of Chancery, not the substantive legal rights of the parties, was involved.[108] Though the question of the liability for the harm done to an

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[102] 124 Fed. 246, 1903. Compare *Platt* v. *Philadelphia and Reading R. R.,* 65 Fed. 660, 1894.

[103] Page 248.

In England it has been held that an agreement among several contributors to a fund for the support of a clergyman, to discontinue their contributions, the purpose of the agreement being to get rid of the clergyman for what they believed to be the good of the parish, did not give the clergyman a cause of action, though, owing to the action of the defendants, he was obliged to resign from the parish. *Kierney* v. *Lloyd,* 26 L. R. Ir. 268, 1889.

[104] The complainants set out in their bill that they were members of a union and that the defendants, officers of a company, had conspired to prevent their obtaining employment. The acts charged, however, were merely discharging anyone who belonged to a union, keeping a list of such persons, and showing such list to those who desired to see it.

[105] The case of *Carew* v. *Rutherford,* 106 Mass. 1, 1870, *supra,* is a case which grew out of a labor strike, but it will be remembered that the suit in that case was for damages for forcing the plaintiff by means of a strike to pay money he did not owe, not for damages for the result of a strike.

[106] 63 Fed. 310, C. C. A., 1894.

[107] The report of this case in the circuit court will be found in 60 Fed. 803, 1894, under the name of *Farmers' Loan and Trust Co.* v. *North Pac. R. R. Co.*

[108] Pages 319, 320.

employer by a sudden and prearranged cessation of work on the part of his employees has never come fairly before the courts, it may be assumed, that if the purpose of the strike is to improve the economic conditions of the laborers, or has something to do with their terms of employment, they are not liable for the resulting harm. Indeed, this assumption has been frequently made by our courts.[109] Whether the strikers would be liable if their purpose was a purely malicious one is doubtful.[110] It depends upon two questions: First, whether the purpose of an actor should be taken into consideration in solving questions of alleged tort; and, second, admitting that purpose should at least in some cases be taken into consideration, whether the act of severing the relations of employer and employee by the latter or by the former should be treated as an act over which the purpose of the actor could have an effect on his legal liability for the consequent harm. These are questions which remain undetermined in our law and on which great confusion exists.[111] The typical case, however, is not the strike with the malicious purpose, but the strike with the economic purpose; that is, the advancement of what the strikers believe to be their own interests. This is not only true of the labor strike, but is also true of the trade strike discussed in the first part of this article, and the employers' strike which expresses itself in the blacklist or lockout. It may with a good deal of confidence be asserted, in spite of the absence of positive authority on many phases of the proposition, that two or more persons who agree not to have business relations with a third are never liable to the third person for the harm resulting if their purpose is their own advance-

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[109] For an example of such an assumption see *Wabash R. R. Co.* v. *Hannahan,* 121 Fed. 563, 1903, 570. Compare *Allis Chalmers Co.* v. *Reliable Lodge,* 111 Fed. 264 N. Y., 1901, 268.

[110] Compare the cases in which the courts have stated if they have not decided that one trader may refuse to deal with another trader irrespective of his purpose or motive.

[111] The confusion in the trade and labor cases on these questions has been treated by the author in a recent article in the *Columbia Law Review* for February of the present year, entitled "Should the Motive of the Defendant Affect the Question of His Liability?—The Answer of One Class of Trade and Labor Cases." 5 *Col. Law. Rev.* 107.

ment, unless in severing their relations with him they break some contract or contracts.

Down to the point which we have now reached in the development of the law we notice a sharp contrast in the way in which the law treats a strike and a boycott. The strike, at least for the purpose of economic advancement, is, from the point of view of civil law, legal. The boycott, on the other hand, for the same purpose has usually been considered illegal. Laborers may combine to leave the service of their employer and he cannot recover from them damages for the resulting loss to him; but if they leave him in order to compel him not to deal with a third person, then, though he may have no action against them, the third person has an action. Admitting this difference in the legal aspect of a strike and boycott, the most recent trade and labor cases have illustrated the difficulty of determining in some instances whether what looks likes a strike is not in reality a boycott. In *Longshore Printing Company* v. *Howell,*[112] for instance, a case arising in Oregon in 1894, a union declared a strike at A's works. Members of the union, employees of A, had they refused to strike would have been expelled from the union. If the cessation of labor on the part of all those who left A's employ was voluntary or merely the result of persuasion by argument all parties admitted that A was not entitled to have the injunction he asked for to restrain the order to strike; but, if the order to strike was obeyed by some of the laborers because of fear of economic harm, then there was, not merely a strike, but a boycott of the plaintiff. In this case the court did not think there was enough evidence of coercion of individual members to warrant their issuing an injunction. In the New York case of *Coons* v. *Chrystie,*[113] however, the officers of a union were restrained from declaring a strike at the plaintiff's factory, the court believing that the employees would not strike unless some form of coercion accompanied the order. In *Wabash Railroad Company* v. *Hannahan,*[114] the court on similar facts came to an opposite

[112] 26 Ore. 527, 1894.
[113] 53 N. Y. Supl. 668, 1898.
[114] 121 Fed. 563, 1903.

conclusion. The mere fact that a number of laborers agree that they will strike when told to do so by their president or other officer is not, of course, proof that those who strike as the result of such an order are coerced. It may merely indicate that they have determined for their own benefit to follow the advice of another. Coercion in such cases is a matter of fact to be determined by ascertaining what would happen to the individual workman if he refused to obey the so-called "order to strike." If the result to one who refused to obey would be physical or economic harm, then there is coercion, if the threat has in fact affected the action of some of those who leave the plaintiff's employ. In *Boutwell* v. *Marr*,[115] a Vermont case, the same question arose out of what was on its surface merely a trade strike. The members of an association of granite manufacturers composing ninety-five per cent. of the trade passed a rule that no one should have his granite polished by a person not a member of the association on the penalty of a fine of fifty dollars. In consequence of this resolution members of the association refused to send their granite to A. A sued the members of the association for a conspiracy to injure, and recovered on the ground that a boycott exists when unity of action is secured by threats. The fine of fifty dollars constituted, in the opinion of the court, such a threat. It may be presumed that the court thought the persons who had been sending their granite to the plaintiff refused to do so because of the threat of the fine, for, of course, a plaintiff cannot recover on the ground of boycott unless there is a casual connection between the alleged coercion of third persons and the harm of which he complains.[116] The conclusion from these cases is, that merely calling something

[115] 42 Atl. 607 Vt., 1899.

[116] Thus in *Downes* v. *Bennett*, 63 Kas. 653, 1901, a case similar in all respects to *Boutwell* v. *Marr*, except that there was no definite sum mentioned in the rules of the association as a fine for a member dealing with the plaintiff, the plaintiff asked for an injunction to restrain the members of the association, by threats of fine or expulsion from the association, preventing the individual members from dealing with the plaintiff. The court refused the injunction because the plaintiff failed to prove that the fine was the cause which induced the members not to deal with the plaintiff.

a voluntary cessation of work or trade relations does not make it voluntary, and if the severence of business relations is not voluntary on the part of all participating, it may be treated by the courts, not as a conspiracy to do a lawful act—that is, sever business relations—but a conspiracy among some of those who strike to do an unlawful act—that is, coerce others to sever their business relations with the plaintiff.

Another class of problems in tort arising out of trade and labor controversies is due to the fact that in some jurisdictions if A persuades B by argument not to deal with C this gives C a right to recover from A unless A has a legal excuse—such, for instance, as a purpose to advance himself. Where the officers of a labor union have been selected by the members to tell them when it is for their interest to strike, they are not liable if, for a purpose germane to their appointment, they order a strike. But suppose the court should think that the officer of a union urged C's employees to join his union merely for the purpose of ordering them to leave C's employ, then the mere fact that C's employees joined the union first and struck afterwards does not alter the fact that a stranger to C and his employees has interfered and persuaded the employees to leave. It is this conception that the officer of a labor union is an interloper, a conception which sometimes corresponds with the fact, which causes such a decision as *Old Dominion Steamship Company* v. *McKenna*,[117] where the company recovered in an action at law against the members of the board of the executive council of a union for persuading the company's employees to strike.

Another possible class of difficulties arising out of the rule of law which holds that he who persuades one man not to deal with another must have a legal excuse, is suggested by a case decided in Minnesota in 1900, *Ertz* v. *Produce Exchange*.[118] In that case the plaintiff alleged that the defendants, the members of a produce exchange, conspired

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[117] 30 Fed. 48, 1887.
[118] 79 Minn. 140, 1900.

to refuse to deal with him; and one defendant, the produce exchange, "did maliciously solicit and procure from all its co-defendants, and each of them, and from many other persons to the plaintiff unknown, an agreement not to sell to or buy from the plaintiff." [119] The defendants demurred. The Supreme Court affirmed the action of the lower court in overruling this demurrer. It will be noted that the plaintiff had alleged that the defendants or one of them had persuaded third persons not to deal with him. The court in effect takes the position that to persuade a third person not to deal with another is a civil wrong to that other if harm results, unless he who persuades has some legal excuse. The difference between persuading by argument persons to conspire with you not to deal with another and conspiring to persuade third persons not to deal with another might have been considered. But the court treat the case as raising the same kind of a question as the earlier case of *Bohn Manufacturing Company* v. *Hollis*,[120] in which there was a mere agreement between several persons not to deal with the plaintiff. The two cases are distinguished on the ground, that in the earlier case the defendants had a legal excuse in the fact that they were seeking their own economic advancement, while in the latter the demurrer was in effect a contention that the defendants did not need any excuse. If the act of persuading a person not to deal with a third needs a legal justification, it is immaterial whether the person persuaded is asked to enter into an agreement with the persuader to persuade others. This is the position which is practically taken by the court in this case. It appeals strongly to logic and common sense. If correct, however, it is necessary to explain and qualify the usual assertion, which as we have seen has been made in many of the trade and labor cases,[121] namely, that in the law of private wrongs, there is no such thing as a conspiracy to do a rightful thing. A may cease to deal with C for a good reason, a bad reason, or no reason at all, and the law will perhaps give C no

[119] Pages 142, 143.
[120] 54 Minn. 223, 1893, *supra.*
[121] *Supra,* note 9.

remedy; to maliciously persuade another, however, is quite another matter. Yet how can we conceive of an agreement between two or more persons not to deal with a third without supposing that the parties to the agreement or some of them persuaded the others or each other to enter into it? It follows, therefore, that while A may not have an action against B, though B with a malicious purpose refuses to buy or sell to him, A may have an action against several who with the same purpose combine to refuse to deal with him; not because of the combination, but because combination presupposes mutual persuasion for its creation and continuation. At any rate, one can hardly read the opinion in *Ertz* v. *Produce Exchange* without realizing that the decision would have been the same even though the plaintiff had not alleged that the conspirators had persuaded third persons not in the conspiracy to refuse to deal with him.

In the *Johnston Harvester Company* v. *Meinhardt*[122] it was held, as we have seen,[123] that for the purpose of self-advancement one man may offer money or other advantage to another to persuade that other from dealing with a third without being liable to the third person for the resulting harm. All underselling in the process of competition in business would be impossible if self-advancement was not an excuse for the harm done to a rival trader by underselling. But suppose the underselling is not for any legitimate trade purpose, but merely for the purpose of doing harm to another? This question came before the Circuit Court of Appeals of the Eighth Circuit in the case of *Passaic Print Works* v. *Ely & Walker Dry Goods Company*.[124] The plaintiff set out in his declaration that the defendants were underselling him, not because they were desirous of advancing their own trade, but for the purpose of injuring the plaintiff's. The demurrer of the defendant was sustained, the opinion of the court being written by Judge Thayer, who expressly follows the position apparently adopted by several of the judges in the House of Lords in the case of *Allen*

[122] 60 How. Pr. 168, N. Y., 1880.
[123] *Supra*, page 479.
[124] 105 Fed. 163, C. C. A., 1900.

v. *Flood*,[125] that *prima facie* a lawful act cannot be made unlawful by the motive which prompted it. Judge Sanborn dissented because he took the position that as the defendant's act had caused the plaintiff harm, he was liable for that harm or not according to the purpose with which he acted. The exact question raised in the case is new, and it will take several decisions to settle the law. An opinion as to the correct decision depends on whether the motive or purpose of the actor should be considered in this class of cases. The writer believes that it should be considered. This question, however, he has discussed at length elsewhere.[126] Whatever opinion may be had in regard to this disputed question, there would appear to be no doubt that in a large number of cases the motive of the actor has determined his liability for the harmful consequences of his act, and that the general trend of authority in the trade and labor cases is in favor of the view taken in the dissenting opinion in *Passaic Print Works* v. *Ely & Walker Dry Goods Company*.[127] In the words of Lord Coleridge, in speaking of the very question raised later in the Passaic Print Works case, "It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man may be ground for such an action as this."[128]

William Draper Lewis.

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[125] (1898) A. C. 1.

[126] The article in 18 *Har. Law Rev.* 444, referred to *supra*, note 94, and an article in 5 *Col. Law Rev.* 107, "Should the Motive of the Defendant Affect the Question of His Liability?"

[127] See the discussion of *Walker* v. *Cronin, supra*, and the article by Prof. Ames in 18 *Harv. Law Rev.* 411, referred to *supra*.

[128] *Mogul S. S. Co.* v. *McGregor*, 21 Q. B. D. 544, 1888, 553.

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